

Book Reviews

The Nearest Relative Handbook by David Hewitt

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Deciding on a publication date is always a risky business. This text could have become the dinosaur of mental health law books if Parliament had reverted to the Government's original proposals for the "nominated person" to replace the nearest relative. The book went to press before the *Mental Health Act 2007* received Royal Assent, and the author and publishers must be mighty relieved that the changes to the current law on the nearest relative have turned out to be minimal. If anything, too much attention has been paid to the various proposals and to speculation about changes in the nearest relative role, rather than concentrating on the actual position.

Overall this book will be of benefit to mental health professionals working in England or Wales, but I am not sure how useful it will be for one of its target groups, nearest relatives themselves. Despite the range of examples it remains a rather complex text with no basic summaries of key points to make it more accessible. However, anything that prevents professionals from muddling up the nearest relative with the next of kin, and which may enhance their understanding of this crucial role, is welcome. For an actual nearest relative's view of the role, readers might wish to look at the 2005 *Journal of Mental Health Law* article by Victoria Yeates¹.

David Hewitt is a solicitor who specialises in mental health law and is Assistant Editor of this *Journal*. He was also a *Mental Health Act* Commissioner for nine years. His practical grasp of how the law operates in this field is excellent, and he has illustrated the text with a broad range of case examples.

The book starts with a brief history of the nearest relative. Hewitt wisely draws on Rapaport² for his analysis of the development of the nearest relative's role in relation to a number of areas including: applications for detention, objections to detention, receiving information about the patient and, finally, in the discharge process. These functions then provide the framework for an analysis of problems and proposals for change in the nearest relative's role. There is a very helpful discussion of *JT v UK*³. I would have preferred more analysis of the issues raised by the author, and much less on the various proposals which were discussed during the draft stages of mental health law reform. Hardly any of these proposals have seen the light of day, and I would suggest that this part of the book will now be of limited interest. There is a brief summary of what emerged as the final changes at the end of the chapter and this would probably have sufficed. In contrast, the passages on *R (E) v Bristol City Council*⁴ and other recent caselaw are very welcome and will retain their relevance despite the changes made by the *Mental Health Act 2007*.

1 Yeates, V. (2005) *Death of the nearest relative? Carers' and families' rights to challenge compulsion under current and proposed mental health legislation*. *Journal of Mental Health Law*, November 2005, pp123–137.

2 Rapaport, J. (2003) *The ghost of the nearest relative under the Mental Health Act 1983 – past, present and*

future. *Journal of Mental Health Law*, July 2003, pp51–65.

3 *JT v UK* Application No 26494/95 *European Court of Human Rights* (2000) 1FLR 909.

4 *R(E) v Bristol City Council* (2005) EWHC 74 (Admin).

For a fuller analysis of the Bristol case I would recommend readers to look at the article by Helen Kingston⁵ in an earlier edition of this Journal.

The second chapter tackles the difficult task of identifying the nearest relative of an adult patient. When I started my career as a Mental Welfare Officer under the *Mental Health Act 1959* we used to have the relevant section (on identifying the nearest relative) printed on the back of the application form for detention for treatment (section 26). This helpful aid disappeared with the introduction of the *Mental Health Act 1983* (MHA) (probably because the equivalent form had less space!), and the various statutory and case law changes have made this one of the most difficult and contentious areas of law for Approved Social Workers. As I live and breathe this area of law my criticisms of this essentially sound chapter may appear a little over zealous. People who should be treated as if they are relatives because they have lived with the patient for five years or more are (in my opinion) incorrectly excluded by Hewitt from taking precedence over others within his own version of the hierarchy. For other relatives his stress on the importance of the phrase “ordinarily resides with or cared for by” is more helpful and there are some useful illustrations. This is an area where mistakes are frequently made and I am not sure that this part of the book is as clear as it might have been. Some of the examples are not helpful. One identifies a brother living with the patient as taking priority over a wife, with no mention of the fact that this would only apply if the wife herself were not living with the patient. Readers will need to be stoical, and occasionally to suspend disbelief, as they work through this chapter. These thirty pages of “how to spot the nearest relative” could provide a new cure for insomnia or, more hopefully, lead to a new respect for those who have worked hard to understand and operate this part of the MHA. They successfully integrate the statute with the plethora of case law that has developed over the last few years. It has always been a relief for ASWs that the relevant expression in the MHA is, as Hewitt cites on page 40, the person “appearing to be the nearest relative”. It would have been helpful to have included some further discussion and opinion on what should happen if others (such as the hospital managers) consider that the ASW has identified the wrong person as nearest relative. This has caused some real difficulties in practice. Another related dilemma is: what should happen if the ASW themselves decides with hindsight that they have identified the wrong person as nearest relative on an application form? How can this be rectified?

Chapter 3 sets out the rules that apply when identifying the nearest relatives of children (i.e. any person under the age of 18). This short chapter should be invaluable for those faced with this issue as it is not easy material to carry in one’s head. Chapter 4 then addresses circumstances in which a person will cease to be the nearest relative. This includes the use of Regulation 14 to delegate authority, as well as the county court’s role in displacement or appointment of nearest relatives. The material on court procedure is very helpful and presented more clearly than in many other texts. A comment on what to do if a nearest relative simply refuses to have any involvement at all would have been useful, as the above routes to delegation or appointment are unlikely to be applicable in these circumstances.

Chapter 5 outlines the nearest relative’s powers when admission to hospital occurs or is being considered. It also looks at guardianship, although unfortunately this is not mentioned in the introduction. Guardianship is an area that often involves difficulties concerning the nearest relative. See for example the recent *JE* case in Surrey⁶ where the Approved Social Worker did not pursue guardianship by taking the case to county court when the nearest relative objected to a guardianship application. This case and

5 Kingston, H. (2005) *The balancing act*. *Journal of Mental Health Law*, November 2005, pp186–190.

6 *JE v DE* (1) Surrey CC (2) EW (3) EWHC 3549 (Fam) 2006.

a further Northern Ireland case (*Connor*, 2004)⁷ have led to renewed interest in the relationship between guardianship and deprivation of liberty. The role of the nearest relative in this area is central and a more detailed discussion in any further editions of this book would be welcome.

Returning to admissions to hospital, chapter 5 considers the Code of Practice recommendation that the applicant should usually be the ASW. Given the tiny number of applications made by nearest relatives each year (the Department of Health stopped publishing the details in England when they dropped to single figures) it is interesting that the *Mental Health Act 2007* preserves the nearest relative as potential applicant. One reason suggested for this was a concern that there might be insufficient Approved Mental Health Practitioners to cope with the number of assessments. Yeates argued that the nearest relative should not be the applicant but she stressed the importance of section 13(4) and Hewitt gives good coverage to this area where the nearest relative has a right to an ASW assessment.

There is also some very helpful material in chapters 5 and 7 on the nearest relative's powers to discharge a patient. There is a discussion in chapter 5 of the nearest relative's rights to information. This passage would have been strengthened with a more detailed account of sections 132 and the much neglected 133 (notice by hospital managers of the intention to discharge the patient). There is also some further material on the *Bristol* case. The advice given at paragraph 5.52 that there should be no consultation with the nearest relative in any case where this would cause the patient emotional distress, would seem to rather overstate the implications of the *Bristol* judgement and is in contrast with Kingston's approach of balancing the competing Article 8 rights.

Chapter 6 considers supervised aftercare and considerable attention is paid to this area. This chapter will become redundant when supervised aftercare is replaced by the Community Treatment Order. In the meantime it is useful to have all of the relevant material in just one place. Supervised aftercare is an oddity in that it is the only area in the MHA where the ASW's power to make an application (or in this case, recommendation) is not mirrored by a similar right for the nearest relative. This is balanced by a number of provisions related to supervised after-care where the nearest relative is granted specific rights regarding consultation and appeal. Community Treatment Orders will replicate the ASW's role to the exclusion of the nearest relative and Hewitt observes that the nearest relative loses all of the rights that are currently available to them for supervised aftercare.

There is an error at paragraph 7.4 where it is stated that a nearest relative can order the discharge of a patient subject to a hospital order or guardianship order under section 37. In fact the nearest relative's rights here are limited to being able to make an application to the Mental Health Review Tribunal. Paragraphs 7.7 and 7.22 are also inaccurate in that the 72 hour period does not apply to orders to discharge from guardianship.

Chapter 8 seemed an oddity to me. It concerns the *Mental Capacity Act 2005* and it attempts to draw parallels between the role of the Independent Mental Capacity Advocate (IMCA) and that of the nearest relative. There are areas where the two Acts will overlap and the role of the nearest relative under the MHA may well be relevant where someone has made a Lasting Power of Attorney or where a deputy is appointed. Providing an analysis of these areas of overlap rather than focusing on the role of the IMCA would have been more helpful.

⁷ *Connor, Re An Application for Judicial Review* [2004] NICA 45 (14 December 2004) Ref: KERF5153.

The appendix of statutory extracts is very helpful but there are some notable omissions: section 13(4) covering nearest relative's rights to an assessment; section 23 and the power of discharge; section 25 and the grounds for the RMO's blocking order; and sections 132 and 133 covering information. For those staff and relatives who do not have a copy of the MHA, a more detailed appendix would have been helpful.

Some might think that the subject matter of this book would be worthy of one of the more obscure entries to Mastermind ("Specialist Subject: the full range of powers of the Nearest Relative as defined by the Mental Health Act 1983"). However, I would argue that this is one of the most important areas of the *Mental Health Act 1983* where, in practice, the state meets the family head on. This intelligent and comprehensive analysis is a welcome addition to the currently scant literature in this area.

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